Supreme Court, U.S.
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No. 02-219

In The

Supreme Court of the United States

KIM NETLAND,

Petitioner,

v.

HESS & CLARK, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Did the court of appeals err in holding, consistent with the precedent of nine federal circuits, that FIFRA pre-empts Petitioner's failure-to-warn and other labeling-related state damages actions?

RULE 29.6 STATEMENT

Respondent Hess & Clark, Inc. certifies that it is a wholly-owned subsidiary of Loveland Industries, Inc., which in turn is a wholly-owned subsidiary of United Agri Products, Inc., which in turn is a wholly-owned subsidiary of ConAgra Foods, Inc. Other than ConAgra Foods, Inc., no publicly held company owns 10% or more of Respondent's stock. Of the companies listed above, only ConAgra Foods, Inc. is a publicly-traded company.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioner candidly admits that a "*large majority* of FIFRA preemption decisions" hold that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136v, *et seq.*, expressly preempts state law damages claims that challenge the labeling of a pesticide approved by the United States Environmental Protection Agency ("EPA"). Pet. at 11 (emphasis added). Indeed, all nine of the United States Courts of Appeals that have considered the question in the decade since this Court's seminal express preemption opinion in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) have reached this conclusion. Thus, Petitioner asks this Court to grant the petition for a writ of certiorari despite unanimous circuit court precedent.

The federal appellate authority described above is not only unanimous, but also correct. FIFRA provides EPA exclusive authority concerning pesticide labeling, and to promote national uniformity FIFRA expressly prohibits the states from imposing any "requirements for labeling . . . in addition to or different from those required under FIFRA." 7 U.S.C. § 136v(b). Because Petitioner's action against Respondent seeks to impose a common law labeling requirement on Bovinol® that would be "in addition to or different from" that required by EPA under FIFRA, the court of appeals correctly held that FIFRA preempts Petitioner's action.

STATEMENT OF THE CASE

During all times relevant herein, Bovinol® was an insecticide registered with EPA under FIFRA and carried an EPA-approved label. That label identifies all of Bovinol®'s legal and approved uses, none of which include use on horses. The Bovinol® label lists various warnings and precautions, including instructions to use specific personal protective gear when spraying Bovinol®. Part of the label reads:

> **HAZARDOUS TO HUMANS AND DOMESTIC ANIMALS WARNING**
>
> May be fatal if swallowed, inhaled or absorbed through the skin or eyes. Rapidly absorbed through skin and eyes. *Do not get into eyes, on skin or on clothing. Do not breathe vapor or spray mist. . . .*
>
> Wear *clean natural rubber gloves, protective clothing, and goggles, faceshield or equivalent. Wear a pesticide respirator* jointly approved by the Mining Enforcement and Safety Administration (MESA) and the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part 11. *Wear impervious footwear or protective covers* as shoes, boots and other articles made of leather or similar porous materials may be dangerously contaminated.

See Pet. App. 12a-13a (emphasis added). Petitioner did not read the label, he used the product on horses, and he did not wear any of the personal protective equipment required by the label. *See* Pet. App. 13a-14a.

Thus, this case involves substantial misuse of the subject product by the Petitioner. Under § 12(a)(2)(G) of FIFRA (7 U.S.C. § 136j(a)(2)(G)), it is unlawful "to use any

registered pesticide in a manner inconsistent with its labeling."

Dr. Richard Lipsey, the expert upon whom Petitioner pins his allegation that Bovinol® is defective, testified at some length about dichlorvos, the active ingredient in Bovinol®. Dr. Lipsey testified that Bovinol® is an EPA-registered and EPA-approved product that can be safely used under appropriate circumstances. Dr. Lipsey added that he personally sprays his own horses before riding them with pyrethrum (a different pesticidal active ingredient), that he personally recommends pyrethrum for horses, and that most people use pyrethrum for horses. Pet. App. 9a.

Other than his personal preference for pyrethrum, Dr. Lipsey's remaining complaints with Bovinol® all directly challenge the pesticide's labeling. First, Dr. Lipsey stated "[a] prudent manufacturer would have put the fact that [Bovinol] can affect bone marrow; that this . . . can cause leukemia [on the label]." Dr. Lipsey's second complaint is that the label is not specific about the parameters of using the product on horses. In particular, Dr. Lipsey testified, "[the label does not say] 'Do not apply to horses.' They said okay to horse barns and okay to pests that get on horses, but they didn't exclude horses, so you can assume that you can apply it to horses." Dr. Lipsey's final complaint with Bovinol® also concerns the pesticide's labeling, but in this instance, he opines that the label's instructions to the user to use personal protective equipment is "overkill," and that the label should merely state "avoid breathing the vapors" or "avoid getting it on your skin." Pet. App. 9a-10a.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT IN THE FEDERAL APPELLATE COURTS.

Since this Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), "every federal court of appeals that has addressed the issue before us has . . . held that both failure-to-warn and labeling-based claims brought under common-law causes of action against manufacturers of pesticides are preempted by [7 U.S.C.] § 136v." *Ackles v. Luttrell*, 561 N.W.2d 573, 577 (Neb.), *cert. denied*, 522 U.S. 928 (1997). The nine federal Courts of Appeals to so conclude have largely relied upon the *Cipollone* Court's holding that express preemption of state "requirements" normally encompasses not only positive enactments such as statutes and regulations, but also state requirements sought to be imposed through common law actions for damages.[1] No federal appellate court has held to the contrary.

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[1] *See, e.g., Netland v. Hess & Clark*, 284 F.3d 895, 898 (8th Cir. 2002); *Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244, 249 (3d Cir. 1999); *Andrus v. Agrevo USA Co.*, 178 F.3d 395, 398-99 (5th Cir. 1999); *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 607-08 (8th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 661-62 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 561 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124, 129 (4th Cir. 1995); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993); *King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir.), *cert. dismissed*, 510 U.S. 985 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf*

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This Court itself has indicated that *Cipollone* informs express preemption analysis under FIFRA. Shortly after it decided *Cipollone*, "the Court vacated two courts of appeals judgments that FIFRA *impliedly* preempted state law failure-to-warn claims and remanded for those courts to reconsider their decisions in light of *Cipollone*." *King v. E.I. DuPont de Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993) (emphasis added).[2] On remand, both courts held that FIFRA *expressly* preempted state law failure-to-warn claims.[3]

Naturally, Petitioner attempts to focus this Court's attention on the isolated exceptions to this overwhelming authority. He is only able, however, to cite to one dated, discredited federal appellate court decision and two state court decisions. The federal court decision – *Ferebee v. Chevron Chemical Company*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) – is inconsistent with this Court's subsequent opinions in *Cipollone* and *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). Since *Cipollone*,

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Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177, 1179 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993).

[2] *See Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded*, 505 U.S. 1215 (1992); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir.), *vacated and remanded*, 506 U.S. 910 (1992).

[3] *See Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993). *See also King*, 996 F.2d at 1349 ("The Supreme Court has itself indicated that *Cipollone* applies to FIFRA preemption determinations."); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995) ("The Supreme Court . . . has indicated that its analysis in *Cipollone* should be applied to FIFRA preemption determinations.").

courts have overwhelmingly concluded that "[r]eliance on *Ferebee* is misplaced because it is no longer good law." *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36, 42 (2000).

In *Ferebee* the court held that, because a defendant could choose to ignore a jury verdict, common law claims do not impose "requirements" as that term is used in an express preemption clause. In *Cipollone*, this Court rejected this very analysis. The Court explained that common law damages actions are premised on the existence of a legal duty and accordingly, such actions necessarily impose "requirements." *Cipollone*, 505 U.S. at 522. In reaching this conclusion, the *Cipollone* Court stressed that

> "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

Cipollone, 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)).[4] Although the District of Columbia Circuit has not expressly overruled *Ferebee*, it has acknowledged that *Cipollone* repudiated *Ferebee's* central premise by "explaining

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[4] In *Cipollone*, three Justices cited *Ferebee* in support of their dissent from the Court's holding that the later of the two statutes considered by the Court (the 1969 Act) preempted common law claims. 505 U.S. at 537 (Blackmun, J., concurring in part and dissenting in part). This opinion makes clear that the Court has already considered, and rejected, the unduly narrow view of preemption represented by *Ferebee*.

that damage actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted . . ." *Waterview Management Co. v. F.D.I.C.*, 105 F.3d 696, 699 (D.C. Cir. 1997).

Of the two state court opinions Petitioner cites, one relies on *Ferebee* and the other, from an intermediate appellate court, contains virtually no analysis whatsoever. *See Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied*, 122 S. Ct. 40 (2001) and *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. Ct. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000), respectively. Neither of these two aberrant state court decisions is sufficient to create a significant conflict among the lower courts, particularly given the fact that, since *Cipollone*, the appellate courts of at least 24 states have reached a conclusion consistent with the federal courts.[5]

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[5] *See Traube v. Freund*, ___ N.E.2d ___, 2002 WL 1881206 (Ill. Ct. App. Aug. 14, 2002); *Dow Chemical Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001); *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36 (Cal. 2000); *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000); *Lewis v. American Cyanamid Co.*, 715 A.2d 967 (N.J. 1998); *Ackles v. Luttrell*, 561 N.W.2d 573 (Neb.), *cert. denied*, 522 U.S. 928 (1997); *Barnes v. Sandoz Crop Protection Corp.*, 938 P.2d 95 (Ariz. App. Div. 1997); *Romah v. Hygenic Sanitation Co.*, 705 A.2d 841 (Pa. Super. Ct. 1997), *aff'd*, 737 A.2d 249 (Pa. 1999); *Eide v. E.I. Du Pont de Nemours & Co.*, 542 N.W.2d 769 (S.D. 1996); *Buddington v. Sterling Winthrop, Inc.*, 1996 Conn. Super. LEXIS 2402 (Conn. Super. Ct. 1996); *Babalola v. Chrystal Chemicals Inc.*, 644 N.Y.S. 2d 1 (N.Y. App. Div. 1996); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Gorton v. American Cyanamid Co.*, 533 N.W.2d 746 (Wis. 1995), *cert. denied*, 516 U.S. 1067 (1996); *Quest Chem. Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *Hochberg v. Zoecon Corp.*, 657 N.E.2d 1263 (Mass. 1995); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. Ct. App. 1995), *appeal denied* (Tenn. Mar. 25,

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II. THE COURT OF APPEALS CORRECTLY HELD THAT FIFRA EXPRESSLY PREEMPTS PETITIONER'S COMMON LAW LABELING CLAIMS.

The language of FIFRA's preemption clause, EPA's pervasive and comprehensive regulation of pesticide labeling, and this Court's precedents all support the decisions of the nine federal appellate courts upholding preemption, including the decision below.

A. FIFRA Gives EPA Exclusive Authority to Regulate Pesticide Labeling.

To promote the goals of FIFRA, Congress vested in EPA the exclusive authority to regulate the content of pesticide labeling. In its exercise of this authority, EPA has established a comprehensive regulatory scheme to ensure the proper content of pesticide labeling. Before a pesticide may be sold in the United States, it must be registered and its labeling approved by EPA. 7 U.S.C. § 136a(a). To secure registration, an applicant must submit proposed "labeling" for the product to EPA. 7 U.S.C. § 136a(c)(1)(C). "Labeling" includes not only the written or graphic matter

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1996); *Hue v. Farmboy Spray Co.*, 896 P.2d 682 (Wash. 1995); *Jenkins v. Amchem Products, Inc.*, 886 P.2d 869 (Kan. 1994), *cert. denied*, 516 U.S. 820 (1995); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131 (Fla. 4th Dist. Ct. App. 1993); *ICI Americas, Inc. v. Banks*, 440 S.E.2d 38 (Ga. Ct. App. 1993), *aff'd in relevant part*, 450 S.E.2d 671 (Ga. 1994); *Moody v. Chevron Chem. Co.*, 505 N.W.2d 900 (Mich. Ct. App. 1993), *appeal denied*, 525 N.W.2d 450 (Mich. 1994); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142 (N.C. Ct. App. 1993); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. Ct. App. 1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992), *cert. denied*, 507 U.S. 1051 (1993).

attached to the container itself, but also all written, printed, or graphic matter accompanying the container or to which reference is made on the attached label. 7 U.S.C. § 136(p). EPA has promulgated detailed regulations specifying the scope, content, wording, and format of pesticide labeling. *See* 40 C.F.R. § 156.

Under FIFRA, it is unlawful for any person, including a manufacturer, to alter EPA-approved labeling in any way without EPA's prior approval. *See* 7 U.S.C. § 136j(a)(2)(A). As a result, pesticide manufacturers are not free to add additional warnings on their own after a particular label has been approved. EPA's regulations require that any proposed labeling change requiring consideration of scientific data (such as additions or modifications of a warning or precaution) must be reviewed and approved by EPA in advance. *See* 40 C.F.R. § 152.81(b)(4). In addition, submission of additional unreasonable adverse effects information is required by EPA after a pesticide has been registered. *See* 40 C.F.R. § 159.184. Such adverse effects information can lead to EPA-imposed labeling changes. *See* 43 Fed. Reg. 37,611, 37,613 (1978).

EPA may not register a pesticide or approve its labeling unless the agency finds that the product does not pose any "unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of [its] use." 7 U.S.C. § 136(bb). In registering Bovinol® and approving its labeling, EPA necessarily concluded that this standard was satisfied.

B. FIFRA's Preemption Clause Expressly Prohibits State-Imposed Labeling Requirements, Including Those Imposed Through the Common Law.

Under the analysis this Court established in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992), EPA's exclusive federal regulation of pesticide labeling expressly preempts any state-imposed pesticide labeling requirements, as the federal appellate courts that have considered this issue all have recognized. In *Cipollone*, the Court interpreted the preemption clause in the Public Health Cigarette Smoking Act of 1969 ("PHCSA"), which preempted "*requirement[s]* or prohibition[s] based on smoking and health . . . with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." 505 U.S. at 515 (quoting § 5(b) of PHCSA) (emphases added). The Court held that the use of the word "requirement" indicated Congress's intent to preempt state common-law labeling claims. *Cipollone*, 505 U.S. at 521-25.

Like the PHCSA, FIFRA demonstrates that Congress intended to preempt state common-law claims premised on allegedly inadequate pesticide labeling. In 7 U.S.C. § 136v, Congress confirmed that the states may regulate the sale or use of EPA-registered pesticides, but expressly prohibited any state from establishing independent labeling or packaging requirements:

> § 136v Authority of States
>
> (a) In general
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does

> not permit any sale or use prohibited by this subchapter.
>
> (b) Uniformity
>
> Such State shall not impose or continue in effect any *requirements* for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v (emphasis added). As the U.S. Courts of Appeals cited above have held, FIFRA's preemption of state "requirements" indicates Congress' intent to displace labeling requirements imposed by state statutes, regulatory enactments, *and* common law. *See* cases cited at note 1.

Petitioner tries to attach great significance to the fact that under FIFRA, the pesticide registrant submits proposed labeling, while Congress drafted the warning language at issue in *Cipollone*. Of course, the reason that Congress did not mandate the precise language of pesticide labeling in FIFRA is because it would be completely impractical to do so. Unlike products such as cigarettes, which are relatively uniform and amenable to across-the-board warnings for the hazards they pose, each pesticide product differs in terms of its unique combination of active and inert ingredients, physical and chemical characteristics, formulation type, environmental behavior, use patterns, and toxicity.[6]

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[6] "FIFRA cannot impose a specific language requirement for warning labels like the 1969 Cigarette Act because FIFRA regulates a wide variety of products that cannot be serviced by a single statement." *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 560 (9th Cir. 1995).

Petitioner does not dispute that EPA retains exclusive authority over pesticide labeling, as discussed above in Part II(A). This comprehensive EPA control over labeling helps to demonstrate why the courts have so uniformly concluded that *Cipollone* governs the interpretation of FIFRA's preemption clause.

Four years after deciding *Cipollone*, this Court returned to express preemption analysis, reaffirming the essential principles of *Cipollone* in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). In *Medtronic*, a five-Justice majority reaffirmed *Cipollone*'s holding that "state common-law damages actions *do impose 'requirements'* and are therefore pre-empted where such requirements would differ from those imposed by [statute]." *Medtronic*, 518 U.S. at 509 (O'Connor, J.); *id.* at 504-05 ("ordinarily, insofar as the MDA pre-empts a state requirement embodied in a state statute, rule, regulation, or other administrative action, it would also pre-empt a similar requirement that takes the form of a standard of care or behavior imposed by a state-law tort action") (Breyer, J.).

The divided *Medtronic* Court held that the Medical Device Amendments of 1976 (the "MDA") did not preempt plaintiffs' claims premised on the alleged defectiveness of a pacemaker. The Court's decision was based in large part upon the cursory review given the particular medical device by the Food and Drug Administration ("FDA"). Pursuant to 21 U.S.C. § 360(k) (§ 510k of the MDA), a manufacturer of a medical device may avoid the MDA's rigorous and time-consuming premarket approval process by demonstrating to the FDA that a device is "substantially equivalent" to a device already on the market before the MDA's 1976 effective date. Essentially a "grandfathering" clause, this "§ 510k process" "requires little information,

rarely elicits a negative response from the FDA, and gets processed very quickly." *Medtronic*, 518 U.S. at 479.

One striking difference between Medtronic's MDA preemption and the FIFRA preemption at issue here lies in the differing regulatory role of the federal agencies assigned with implementing the statutes. As Justice Stevens explained in *Medtronic*:

> Unlike the statute construed in *Cipollone*, for instance, pre-emption under the MDA does not arise directly as a result of the enactment of the statute; rather, in most cases a state law will be pre-empted only to the extent that the FDA has promulgated a relevant federal 'requirement.' . . . Congress explicitly delegated to the FDA the authority to exempt state regulations from the pre-emptive effect of the MDA – an authority that necessarily requires the FDA to assess the pre-emptive effect that the Act and its own regulations will have on state laws.

518 U.S. at 496-97. In distinguishing MDA preemption from FIFRA preemption, the California Supreme Court recognized that "Congress did not give EPA an analogous role in implementing FIFRA." *Etcheverry v. Tri-Ag Service, Inc.*, 93 Cal. Rptr. 2d 36, 44 (2000).[7]

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[7] As the *Etcheverry* court noted, "the overwhelming majority" of courts have held that "*Medtronic* does not undermine the conclusion that FIFRA preempts state failure-to-warn claims." 93 Cal. Rptr. 2d at 43. In addition to *Etcheverry*, the "overwhelming majority" includes, e.g., *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559, 563 (1st Cir. 1996); *Lewis v. American Cyanamid Co.*, 715 A.2d 967, 973 (N.J. 1998); *Oliver v. Reckitt & Coleman, Inc.*, 12 F. Supp. 2d 1287, 1291 (M.D. Fla. 1998); *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378, 1384 (E.D.

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Another significant difference between FIFRA preemption and the preemption this Court rejected in *Medtronic* involves the level of scrutiny with which the responsible agency reviews the subject product. EPA's review of pesticide labeling is much more thorough than the FDA's review of § 510k medical devices, in which the safety of the device is not even considered. EPA examines each pesticide label, explicitly considering safety and warning issues, before the pesticide may be registered and marketed. *See* 7 U.S.C. § 136a(c)(5). The *Medtronic* Court's concern, then, with the cursory nature of the § 510k approval process simply has no application to the FIFRA preemption analysis.[8]

Petitioner mistakenly cites *Medtronic* for the proposition that there is no preemption here because the state law damages claim is "based on duties that parallel

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Wis. 1996); *Koch v. Shell Oil Co.*, 173 F.R.D. 288, 289 (D. Kan. 1997); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208, 212 (Iowa 1998); *Sherman v. Claire Mfg. Co.*, 657 N.Y.S.2d 453, 454 (N.Y. App. Div. 1997); *Ackles v. Luttrell*, 561 N.W.2d 573, 579 (Neb. 1997); and *Didier v. Drexel Chem. Co.*, 938 P.2d 364, 367 (Wash. Ct. App. 1997).

See also Eyl v. Ciba Geigy Corp., ___ Neb. ___, ___ N.W.2d ___, 2002 Neb. LEXIS 198, *20 (Sept. 6, 2002) ("the preemption language employed in FIFRA [is] more similar to the statutory language in *Cipollone* than the statutory language in *Medtronic*").

[8] *See Lewis v. American Cyanamid Co.*, 682 A.2d 724, 731 (N.J. Super Ct. App. Div. 1996) ("FIFRA has no escape clauses like the 'grandfathering' and 'substantially equivalent' provisions of the MDA. The statute and regulations provide that substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels . . ."), *aff'd*, 715 A.2d 967 (N.J. 1998) ("[u]nlike the MDA, . . . FIFRA imposes specific labeling language on insecticide products").

requirements imposed under FIFRA." Pet. at 25. Petitioner (despite not reading the labeling) contends that the EPA-approved labeling did *not* provide him with adequate warnings to ensure his safety. "FIFRA does not allow states to second-guess EPA's labeling decisions under the guise of enforcing the requirements of FIFRA itself." *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 666 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998).

Petitioner also relies heavily on a position taken by the Justice Department as *amicus curiae* in two cases, one in which plaintiffs alleged that the pesticide did not work and the other in which plaintiffs alleged that the pesticide damaged their crops. *See Etcheverry v. Tri-Ag Service*, 93 Cal. Rptr. 2d 36 (Cal. 2000); *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000). The government's position (a) was never raised by the government until 1999, after years of uniform holdings to the contrary; (b) was rejected by the California Supreme Court in *Etchevery*,[9] and (c) has not been advocated by the government since *Etcheverry*.[10]

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[9] In *Hart*, the issue before the court was whether the defendants properly removed the case to federal court under the "complete preemption doctrine." The Fifth Circuit held that because FIFRA preemption did not provide a "complete" defense to all pesticide claims, but instead was limited to warning and labeling claims, complete preemption did not obtain. 199 F.3d at 244-46. Notably, the Fifth Circuit's holding that FIFRA preempts labeling claims, reached in *MacDonald v. Monsanto*, 27 F.3d 1021 (5th Cir. 1994), was not questioned in *Hart*, nor has it been since.

[10] In *Eyl v. Ciba Geigy Corp.*, ___ Neb. ___, ___ N.W.2d ___, 2002 Neb. LEXIS 198 (Sept. 6, 2002), the Nebraska Supreme Court recently rejected arguments similar to plaintiff's here that rely on the Justice Department's *amicus curiae* brief in *Etcheverry*:

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Petitioner's position that his claims are not preempted because Hess & Clark could have warned through means other than the labeling, Pet. at 26-28, is likewise inconsistent with FIFRA and the vast majority of courts that have interpreted it. The Bovinol® labeling contains all the warnings a user needs to utilize the product safely. A common law claim based on the premise that Hess & Clark should have provided different warnings through other channels "necessarily impl[ies] that the labeling and packaging failed to warn the user." *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993). Thus, such a claim is preempted.

Similarly, Petitioner's discussion of the legislative history of the 1972 amendments to FIFRA does not call into question the consistent case law rejecting his position. In a straightforward application of an elementary canon of statutory construction, the "plain wording" of an express preemption clause "necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v.*

> [W]e give no deference to the EPA's position in the *amicus* brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an *amicus* brief with the court in this case. . . . In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an official EPA policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry*, the California Supreme Court did not adopt the EPA's arguments. . . . Under these circumstances, we give no deference to the position taken in the *Etcheverry* brief.

Id. at *24. The *Eyl* court further cited with approval the Eighth Circuit Court of Appeals' decision in this case rejecting plaintiff's request that the court overrule FIFRA preemption precedent based on *Medtronic, Sleath* and *Brown* and on the EPA's brief in *Etcheverry*. *Id.* at *25.

Easterwood, 507 U.S. 658, 664 (1993). Case after case has held that the plain wording of § 136v(b) both encompasses and preempts state law failure-to-warn claims.

In fact, the legislative history *supports* the conclusion that FIFRA preempts common law claims. For example, the original House Report by the Agriculture Committee provides that "[i]n dividing the responsibilities between the States and the Federal Government for the management of an effective pesticide program, the [House Agriculture] Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging." *Id.* at 16. Just as important, "none of the legislative history distinguishes legislative enactments from common law." *MacDonald*, 27 F.3d at 1025 n.3. In view of § 136v(b)'s express preemption of additional or different labeling requirements, it is reasonable to assume that if Congress wanted to save damages claims from preemption, it would have said so in the statute or in the legislative history.

III. PETITIONER'S CLAIMS ARE ALSO IMPLIEDLY PREEMPTED BY FIFRA.

While Petitioner's claims against Hess & Clark are expressly preempted by 7 U.S.C. § 136v(b), a submission of those claims to an implied preemption analysis yields the same result.[11] Under its FIFRA-delegated authority, EPA

[11] Hess & Clark raised the implied preemption argument in the Eighth Circuit, but the court did not reach the issue, instead basing its decision on express preemption. In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-70 (2000), this Court held that the existence of an express preemption clause in a statute does not foreclose the

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has provided that "[a] registrant may distribute or sell a registered product with the composition, packaging and labeling currently approved by the agency." 40 C.F.R. § 152.130(a). Because federal law permitted Hess & Clark to sell Bovinol® with the particular chemical composition and labeling at issue, imposition of liability on Hess & Clark for the exercise of this option would conflict with the regulatory structure of FIFRA. "[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'" *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (7th Cir.) (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)), *cert. denied*, 525 U.S. 1018 (1998).

Under well-settled jurisprudence from this Court, "a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Implied conflict preemption exists, as here, "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Congress's desire for uniformity would be undermined if, after EPA approved the composition and labeling of Bovinol®, the product's manufacturer found itself subject to an array of state common law actions challenging the product's composition and labeling.

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application of implied conflict preemption analysis with respect to that statute. *See also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 352 (2001).

CONCLUSION

Federal appellate courts have unanimously concluded that in *Cipollone*, this Court essentially decided the very issue raised in this petition. These courts have held that FIFRA preempts state claims for damages that are premised on an allegation that pesticide labeling approved by EPA is inadequate. There is simply no reason for the Court to hear this case. Accordingly, Respondent Hess & Clark, Inc. respectfully asks that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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